

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* TALASKI, Minors.

UNPUBLISHED  
March 15, 2016

No. 327224  
Tuscola Circuit Court  
Family Division  
LC No. 14-010698-NA

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*In re* TALASKI, Minors.

No. 329526  
Tuscola Circuit Court  
Family Division  
LC No. 14-010698-NA

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Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 327224, respondent-father appeals by right the trial court's order taking jurisdiction over his minor children, AT and ST, after an adjudication trial. In Docket No. 329526, respondent appeals by right the trial court's order terminating his parental rights to the children under MCL 712A.19b(3)(b)(i), (h), and (k)(ix). On appeal, respondent argues that the trial court erred in various ways and that, as a result of the errors, this Court must reverse the trial court's orders. We conclude that the trial court properly took jurisdiction and did not err when it terminated respondent's parental rights. Accordingly, we affirm in both dockets.

I. BASIC FACTS

The Department of Health and Human Services petitioned the trial court to take jurisdiction over the children after the children's half-sister, LD, reported that respondent had been sexually abusing her. She was nine years of age at the time. As a result of the allegations, the prosecutor charged respondent with several counts of first and second-degree criminal sexual conduct. See MCL 750.520b; MCL 750.520c. The prosecutor also charged respondent with being a felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

In March 2015, respondent pleaded guilty to the two weapons charges; in exchange, the prosecutor dismissed the criminal sexual conduct charges. In May 2015, the trial court in respondent's criminal case sentenced respondent to serve 76 months to 15 years in prison for the felon-in-possession conviction and to serve two years in prison for his conviction of felony-firearm. The court further ordered him to serve his sentence for felony-firearm consecutive to his sentence for being a felon-in-possession.

The trial court in the termination proceeding held an adjudicative trial after respondent pleaded guilty, but before he was sentenced. At the trial, LD testified that respondent sexually abused her on multiple occasions. The trial court found LD to be credible, despite some inconsistencies in her testimony. On the basis of her testimony, the trial court found that the Department had established by a preponderance of the evidence grounds for taking jurisdiction over the children under MCL 712A.2(b)(1) and (2). The court later held a dispositional hearing and found that the Department had established by clear and convincing evidence grounds to terminate respondent's parental rights to the children under MCL 712A.19b(3)(b)(i), (h), and (k)(ix). It also found that termination of respondent's parental rights was in the children's best interests. See MCL 712A.19b(5). Accordingly, it entered an order terminating his parental rights to both children.

Respondent appealed in this Court the trial court's order taking jurisdiction and its order terminating his parental rights.

## II. ADJUDICATIVE TRIAL

### A. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent first argues that his trial lawyer did not provide effective assistance at the adjudicative trial; specifically, he maintains that his lawyer should have impeached LD with inconsistencies from her testimony at respondent's preliminary examination in the criminal case. "The interest of parent and child in their mutual support and society are of basic importance in our society and their relationship occupies a basic position in this society's hierarchy of values." *Reist v Bay Circuit Judge*, 396 Mich 326, 341-342; 241 NW2d 55 (1976) (opinion by Levin, J.). Accordingly, an indigent parent has a constitutional right to be appointed a lawyer at public expense whenever the state seeks to terminate the parent's parental rights. *Id.* at 346. The right to a lawyer necessarily includes the right to competent representation. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). When evaluating a parent's claim that his or her lawyer did not provide effective assistance, "this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *Id.*

In order to establish a claim of ineffective assistance, the respondent must show that his or her lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for his or her lawyer's unprofessional errors, the result of the proceeding would have been different. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864. Where there has been no hearing on a claim of ineffective assistance of counsel, as is the case here, there will be no factual findings to which this Court must defer. Consequently, this Court will evaluate the claim by examining the lower court record alone. *Id.*

at 20. This Court reviews de novo whether a particular act or omission fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the respondent. *Id.* at 19-20.

Respondent criticizes his lawyer's failure to cross-examine LD by highlighting the inconsistencies in her testimony at the adjudicative trial with her testimony at respondent's preliminary examination in his prosecution for criminal sexual conduct. Specifically, respondent argues that his lawyer should have elicited testimony that LD described acts of sexual intercourse in the basement and in a recreational vehicle at the preliminary examination, which she did not mention in her testimony at the adjudicative trial. He similarly maintains that his lawyer should have brought out the fact that LD had related other occasions where respondent had touched her inappropriately that she did not mention at trial.

The manner and extent of cross-examination is generally a matter of trial strategy. *Id.* at 26. When evaluating matters of trial strategy, this Court must indulge a strong presumption that the respondent's lawyer's conduct fell within the range of reasonable professional assistance. *Id.* at 22. Indeed, "[r]eviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did." *Id.* (quotation marks and citation omitted). For that reason, we "must conclude that the act or omission of the [respondent's] trial counsel fell within the range of reasonable professional conduct if . . . there might have been a legitimate strategic reason for the act or omission." *Id.* at 22-23.

The record shows that respondent's lawyer vigorously challenged LD's version of events. Respondent's lawyer cross-examined LD by highlighting inconsistencies in her testimony and by bringing out that she lacked a clear memory. Respondent's lawyer also cross-examined LD about the timing of the events, and elicited testimony that LD had previously been caught stealing money. Respondent's lawyer moreover did bring up differences between LD's trial testimony and earlier statements to a worker at the Child Advocacy Center, Amber Spencer, and her prior testimony at respondent's preliminary examination.

From the questioning, it was evident that LD could not recall what happened in the recreational vehicle. Had respondent's lawyer questioned LD about her prior testimony, the questions might have refreshed her memory and led her to adopt her previous testimony. Similarly, while LD's testimony that respondent placed his hands over her underwear and touched her vagina while in the basement was unfavorable, it likely would have been more damaging to elicit that LD had previously testified that respondent also had sexual intercourse with her on that occasion. The same can be said for other sexual acts referenced in the preliminary examination testimony, but not mentioned in LD's testimony at the adjudicative trial. As this Court has previously explained, a reasonable trial lawyer may properly refrain from aggressively cross-examining or impeaching a child witness in order to "avoid elaboration on damaging points of testimony" and because the trial lawyer believes that the child's testimony "can best be undermined by pointing out inconsistencies" in the trial testimony. *Id.* at 26. Because there might have been a legitimate strategic reason for respondent's trial lawyer's decision to cross-examine LD in this way, we must conclude that respondent's trial lawyer's conduct fell within the range of reasonable professional conduct. *Id.* at 22-23.

Furthermore, in its findings, the trial court noted that respondent's trial lawyer had established inconsistencies with LD's testimony. The court concluded, however, that the inconsistencies and LD's reluctance to testify were understandable because it had been a year "since she's had to think about this," she stated that she had tried to forget about the incidents, and she admitted that it was embarrassing to testify. The court found that, despite the inconsistencies, LD had consistently testified that respondent touched her inappropriately while the two were in the basement of LD's grandmother's home, and LD had consistently testified regarding an incident of oral sex during a hunting event. The court also found that LD's testimony was supported by LD's physical examination, which revealed "abnormalities in and or around" LD's vaginal area that were "not normal" for a girl of her age. Considering the trial court's statements and its superior opportunity to evaluate LD's credibility, *In re BKD*, 246 Mich App 212, 220; 631 NW2d 353 (2001), there is no reasonable probability that the result of the trial would have been different if respondent's trial lawyer had pursued the additional lines of cross-examination that respondent would have preferred. See *Gioglio*, 296 Mich App at 23.

## B. JUDICIAL BIAS

Respondent next argues that the trial judge was biased, which prejudiced his trial. Because respondent did not raise this issue before the trial court, our review is for plain error affecting his substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

Respondent argues that disqualification of the trial judge was warranted under MCR 2.003(C)(1)(a) to (c) because of an alleged friendship between a court employee and LD's grandfather. Disqualification is warranted under MCR 2.003(C)(1)(a) if a judge is actually biased or prejudiced for or against a party or his attorney. "[A] trial judge is presumed to be impartial, and the party asserting partiality has the heavy burden of overcoming that presumption." *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). Absent actual bias or prejudice, disqualification is appropriate under MCR 2.003(C)(1)(b) where there is an appearance of impropriety under Canon 2 of the Michigan Code of Judicial Conduct, or objective and reasonable perceptions give rise to a serious risk of actual bias impacting a party's right to due process as enunciated in *Caperton v AT Massey Coal Co, Inc*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). A judge should be disqualified only in those extreme situations in which, objectively viewed, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 877 (quotation marks and citation omitted). Disqualification is warranted under MCR 2.003(C)(1)(c) if a judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

Respondent argues that the trial judge should have disqualified herself because a court employee, Nicole Friday, is apparently a friend of LD's grandfather. Initially, we note that respondent has not identified any evidence to support his claim that Friday is "good friends" with LD's grandfather. Even assuming that these two parties were friends, however, nothing in the record supports respondent's argument that this friendship was a basis for disqualifying the trial judge. The record does not disclose, and respondent does not identify, the nature of Friday's employment with the court. We note that Friday is listed as the deputy probate register on the court's public website. Further, respondent has not presented or identified any evidence supporting that, through any alleged friendship or working relationship with Friday, the trial judge somehow became personally biased against respondent, or acquired any extra-judicial

knowledge of any disputed evidentiary facts. Respondent had not, by way of example, presented an affidavit or other evidence to suggest that the trial judge and Friday ever spoke about respondent's case, or that the trial judge was even aware that Friday allegedly knew LD's grandfather. Accordingly, there is no factual basis for concluding that the trial judge was actually biased against respondent, or that any alleged friendship between Friday and LD's grandfather gave rise to either an appearance of impropriety, or a serious risk of bias impacting respondent's right to due process based on objective and reasonable perceptions. In addition, there is no evidence that the trial judge had personal knowledge of any disputed evidentiary facts. Accordingly, respondent has not established plain error. *In re Utrera*, 281 Mich App at 8.

## II. TERMINATION

### A. STATUTORY GROUNDS

Respondent argues that the trial court clearly erred when it found that the Department established a statutory ground for termination by clear and convincing evidence. This Court reviews for clear error a trial court's factual findings as well as its ultimate determination that a statutory ground for termination has been proved by clear and convincing evidence. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004).

The trial court could terminate respondent's parental rights under MCL 712A.19b(3)(h), if it found by clear and convincing evidence that he would be "imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years," that he "has not provided for the child's proper care and custody, and [that] there is no reasonable expectation that [he] will be able to provide proper care and custody within a reasonable time considering the child's age." Respondent pleaded guilty to felon in possession of a firearm and felony-firearm, and was sentenced in May 2015 to prison terms of 76 months to 15 years, and two years, respectively, to be served consecutively. His earliest release date is in July or August 2022. Thus, the evidence clearly established that respondent will be imprisoned for more than two years. Although respondent asserts that his children will receive proper care and custody during this period, the trial court's termination order continued the children as temporary court wards and it was uncertain whether they would be returned to their mother. Moreover, the children's placement was not due to any effort or involvement by respondent. Respondent admitted that he did not provide for the children's care and custody, and that he will not be in a position to care for them for at least another six years. He also was not able to provide for them financially, and he admitted that he could not communicate with them due to their young ages. The trial court did not clearly err in finding that the Department established this ground by clear and convincing evidence.

LD's testimony describing respondent's ongoing sexual abuse was also sufficient to support the trial court's finding that the Department also established grounds for termination under MCL 712A.19(3)(b)(i) and (k)(ix). Although respondent again maintains that LD's testimony was not credible, the trial court was in a superior position to evaluate her credibility and we defer to the trial court's finding on that issue. *In re BKD*, 246 Mich App at 220.

Accordingly, the trial court did not clearly err in finding that the Department established these grounds for termination.

## B. BEST INTERESTS

Respondent also argues that the trial court erred in finding that termination of his parental rights was in the children's best interest. We review the trial court's decision regarding the children's best interests for clear error. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012).

“If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.” MCL 712A.19b(5). “[W]hether termination of parental rights is in the best interests of the child[ren] must be proved by a preponderance of the evidence.” *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). “In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. . . .” *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted).

The caseworker testified that she did not observe any bond between respondent and AT, who did not talk about respondent. Moreover, AT was two years old at the time of the termination order, and had not seen respondent for approximately 17 months due to respondent's incarceration. Respondent had never seen ST, who was born after respondent was incarcerated. Conversely, the children had developed bonds with their foster parents, who had previously been their daycare providers. The caseworker testified that future harm was also a concern for ST because, assuming respondent is released when he becomes eligible for parole, ST will be approximately the same age as LD when respondent began sexually abusing LD. The trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests.

Respondent has not established any errors warranting relief.

Affirmed.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Douglas B. Shapiro